

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL

74-2319

B  
P/S

**United States Court of Appeals**

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

FRANK BREEN,

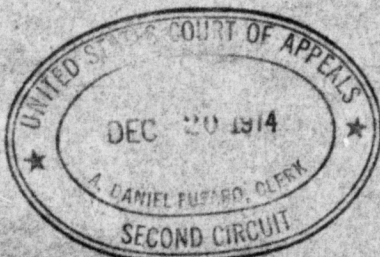
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF NEW YORK

**Appellant's Brief**

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

Docket No. 74-2319

-against-

FRANK BREEN,

Appellant.

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STATEMENT

The appellant, together with others, was charged in a one-count indictment with conspiracy to violate, prior to May 1, 1971, Section 173 and 174 of Title 21, United States Code, and on and after May 1, 1971, to violate Sections 812, 841 (a)(1), 841(b)(1)(a), 951 (a)(1) and 952 of Title 21 thereof.

The indictment charged that the appellant, prior to May 1, 1971, participated in a conspiracy to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of heroin after the said drug had been unlawfully imported into the United States, and that subsequent to the aforesaid date he conspired to distribute and possess, with intent to distribute, a Schedule I narcotic drug.

The appellant was found guilty as charged and sentenced to imprisonment for seven and one-half (7 1/2) years and to special parole supervision for five (5) years thereafter.

He was represented at trial by Theodore Krieger who had been appointed under the Criminal Justice Act. Leave to proceed in forma pauperis having been granted, the assignment was continued by this Court.

The United States of America has been represented by the United States Attorney for the Eastern District of New York, by Charles Weintraub, an Assistant United States Attorney.

### STATEMENT OF FACTS

The appellant and John Indiviglio proceeded to trial before Chief Judge Mishler and a jury in the United States District Court for the Eastern District of New York.

The proof as adduced by the government in support of the indictment can, as initially applicable to the appellant, be synthesized in the following narration.

Tyler Somas testified that he had been employed by the co-appellant Indiviglio and dealt in narcotics while Thomas Matteo, a co-conspirator, was imprisoned. This entailed buying and selling heroin and in 1969, when Somas' source of supply, i.e., "Teddy Miller", was arrested, the appellant was alleged to have supplied a new source, i.e., "Irish", and on occasion made personal delivery thereof.

In the Spring of 1971 the appellant was alleged to have told Somas that he had a heroin connection and the former purchased a pound,

In the fall of 1971 the two conversed as to a second purchase which however did not reach fruition.

On cross-examination Somas admitted to having given a Three Thousand (\$3,000.00) Dollar bribe to three detectives, to having testified before a federal grand jury, and of not having been prosecuted. The witness then modified his testimony so as to allege that rather

than a bribe it was in fact a "shakedown" but that in any event it was not reported to the Police Department. In addition thereto Somas admitted paying Detective Ronald Petri One Hundred (\$100.00) Dollars a month in exchange for information as to impending execution of search warrants in his "area", the existence of any wiretap, the identity of an informant, as well as information as to surveillances.

The witness conceded that he had never been prosecuted in connection with having bribed Detective Petri, nor did he have any knowledge of prospective prosecution. That he had been convicted of two Class A misdemeanors involving the possession of obscene material, the possession of marijuana, and was never charged with any federal narcotic law violation. Moreover that he both assumed and hoped that he would not be so charged as well as anticipated that the United States Attorney would apprise the court of his assistance in connection with state charges of possession of marijuana and attempted possession of a weapon.

The witness further related that he did not pay any income tax on the Fifty Thousand (\$50,000.00) Dollars that he had made while engaged in the trafficking of narcotics, that he had asked the United States Attorney to help him in a pending case in the Family Court of Nassau County by speaking to the judge, and that a federal narcotic agent did speak to a state judge on his behalf.

On redirect the witness alleged that he had voluntarily disclosed

his narcotic dealings but that he could not recall the date when he had initially mentioned the name of the appellant to a federal law enforcement officer.

Faye Somas, Tyler's wife, testified that she was present on three occasions when the appellant delivered heroin to her husband, on four occasions when the appellant arrived carrying a brown paper bag which allegedly contained heroin, and was likewise present on three occasions when heroin was discussed.

Frank Aguiar, a co-conspirator, testified that he was a seller of heroin and in serialim his sources of supply were Charlie Dribbles, Tyler Somas, "Sea-Line", and on two occasions, the appellant.

The witness further related that in the Fall of 1969 the appellant and Thomas Matteo borrowed Sixteen Thousand (\$16,000.00) Dollars for the purchase of a kilogram of narcotics. Thereupon the appellant and Matteo were alleged to have brought the narcotics to Aguiar for packaging and Breen was alleged to have subsequently stored a portion thereof at Aguiar's apartment. Thereafter in 1970 the appellant informed him that his partnership with Matteo had terminated.

On cross-examination Aguiar conceded that he had made some Four Hundred Thousand (\$400,000.00) Dollars in the trafficking of narcotics, and had not paid any income tax thereon, nor ever been

indicted as a result of the failure thereto,<sup>1</sup> nor spent one full day in jail as a result of said activity. He further conceded that the Department of Justice had interceded on his behalf with the state judge who had imposed sentence on him, i.e., an unconditional discharge without probation. Moreover, that he had expended some Twenty-eight Thousand (\$28,000.00) Dollars in corrupting New York City police officers and had never been prosecuted for so doing. This even as late as September 1972 when allegedly assisting the New York City Police in ferreting out official corruption, he endeavored to purchase twenty-two (22) pounds of heroin.

The witness, however, conceded that any dealings that he had with the appellant terminated in 1970, and on redirect examination stated that he understood that the appellant was "out in November of 1969".

The Government then called as its last witness, James Schmidt, a police officer employed by the Village of Northport, New York, who testified as to an alleged admission made by the appellant in May 1974, some three months prior to the trial. The said motion to suppress was in essence that the appellant had stated to this witness that when the police found three hundred and fifty (\$350,000.00) dollars in the home of John Indiviglio, they had overlooked ninety thousand (\$90,000.00) dollars in the trunk of the car.

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1. On cross-examination Aguiar conceded that he had a deal with the United States Attorney that he would not be prosecuted for income tax evasion (S. M. 346).

The Government thereupon rested and a motion for a directed judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure was thereupon made and denied.

The appellant, appearing as a witness on his own behalf, testified that he knew that James Schmidt was a police officer and denied ever having made the statements attributed to him. He further denied ever having had any narcotic dealings with either Tyler Somas, Faye Somas, Frank Aguiar, John Indiviglio, James McCormack, or Thomas Matteo.

On cross-examination by Indiviglio, the appellant denied ever having met him prior to the beginning of the trial, i. e., August 12, 1974.

The appellant in addition to testifying on his own behalf called Dennis Dillon, Esq., a former attorney with the Department of Justice, who conceded that while acting in the said capacity he received a letter from Tyler Somas. He then verified on the face thereof his forwarding it to his associate David Ritchie, "Dave, just as I figured. Now we didn't keep our word. The less we have to do with this guy, the better. Dennis." (S.M. 601)

On cross-examination Mr. Dillon was asked to explain the meaning thereof and responded "I meant to convey to Mr. Ritchie the fact that he had to be very, very careful with Tyler Somas, as he couldn't be trusted, in my opinion." (S.M. 602)

The appellant thereupon rested.

The Government in rebuttal thereupon called John Brophy and Special Agents of the Drug Enforcement Administration, who testified that on May 25, 1974 they had seen the appellant and Indiviglio conversing in "Beth's", an uptown bar.

In surrebuttal the appellant denied ever having met Indiviglio at the aforesaid premises.

The appellant thereupon moved for a directed judgment of acquittal under Rule 29(b) of the Federal Rules of Criminal Procedure, which application was denied.

The cause was then submitted to the jury which returned a verdict of guilty.

POINT ONE

THE APPELLANT'S ADMISSION TO PATROLMAN SCHMIDT WAS INVOLUNTARY AS A MATTER OF LAW AND SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

James Schmidt, a patrolman in the Incorporated Village of Northport, Long Island, New York, testified that he was a social acquaintance of the appellant.

He related that in May 1974 while at a bar, he received a telephone call from the appellant and in response thereto met the appellant in a Manhattan bar. After some preliminary conversation, the appellant allegedly stated "You know, they are trying to put me away for twenty years."

Schmidt responded by saying "Yeah", and related that "I thought he was bombed".

The appellant continued by saying "They found the 350,000 but there was another 90,000 in the trunk of the car".

Schmidt then asked "What car?"

The conversation thereupon ended (S.M. 425). \*

No claim was advanced at the hearing on the motion to suppress, the minutes of which are set forth in the appendix hereto, or on this appeal, that the admission was made during a custodial inter-

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\* The designation "S.M." refers to the stenographic minutes of the trial, on file with the clerk.

rogation. But rather that due to the appellant's intoxication, any admission was involuntary as a matter of law. As such it should at the very threshold have been declared inadmissible by the trial judge and not even submitted to the jury.

In short the Court though complying with the constitutional with the constitutional mandate set forth in Jackson v. Denno, 378 U. S. 368 (1964), and cognizant of the holding by the Supreme Court in Lego v. Twomey, 404 U. S. 477 (1972), that voluntariness need be established only by a preponderance of the evidence rather than by proof beyond a reasonable doubt, did disregard the evaluation of Officer Schmidt that he paid no heed to the statement since he thought that the appellant "was bombed".

The Court on the barren facts hereinabove set forth held:

"I think this is a statement of fact for the jury." (S.M. 426)

It further observed:

" I can tell from the context of the conversation that he knew enough about what was happening so he understood what he was saying. Mind you, that he talks about 350,000 dollars found and that Matteo was shot and there was 90,000 more in the trunk. "  
(S.M. 426-7)

The Court questioned Officer Schmidt as to other conversations then had with the appellant and "whether he was logical in your mind. "  
(S.M. 427)

The witness responded by stating that they "shot a game of

pool," but that the appellant was not steady, that although he was not as good a pool player as the appellant, yet he beat him and indeed "ran the table on him" (S.M. 428)

The Court continued its inquiry of Officer Schmidt by asking whether the conversation was in point or did the appellant wander? The response was "I guess you could say he wandered a little bit."

We were talking about something else and this came in and at that time I didn't have the slightest idea what he was talking about. I just thought it was mumble." (S.M. 428)

On cross-examination Schmidt admitted that he had told a federal law enforcement officer that the appellant had been "obviously drinking to excess" and the characterization was repeated in his testimony at the hearing.

The Court inquired whether the appellant was "well-oriented as to time and place? Did he know where he was" (S.M. 437)

Officer Schmidt replied in a classic non sequitur, "He knew where he was as far as time goes -- the man was bombed he was drunk" (S.M. 437)

The appellant thereupon rested, Officer Schmidt's testimony constituting the sole evidence as to the voluntariness of the admission.

The Court in holding the admission to be voluntary stated:

" THE COURT: All right, based on the testimony of Police Officer James Schmidt, I find that the defendant called Police Officer Schmidt and told him he had been drinking, told him where he was, advised him how to get there from Northport, told him that he couldn't get back to Northport because there were no trains scheduled, and there is no reason to believe that was erroneous and the defendant hasn't offered any proof that this was just an illusion of his or a misjudgment of some kind attributable to the drinking.

The fact that they both consumed three extra ounces, I assume, of a hard liquor over a period of 45 minutes, leads me to believe that this defendant was fully aware of what he was saying. He must have been oriented as to time and place, because he called the police officer, told him where he was, gave him all the other information which apparently turned out to be correct. His coordination was somehow impaired by the liquor, but that does not mean that his thinking process was impaired to the same degree and so I find that the defendant Breene knowingly and voluntarily made the statement in which he in effect said, "I am in trouble, they are trying to put me away for 20 years. They found \$350,000 and there was \$90,000 more in the trunk of the car."

You have an exception."  
(S.M. 438-9)

The appellant's inebriation was additionally characterized by the prosecutor in his summation as:

" Mr. Breene is intoxicated in a bar, he gets drunk, probably never would have said it otherwise, and he lets it slip out, tells a friend of his who is also a cop,

"I'm facing twenty years, you know,  
that 350 they recovered, they missed  
another 90,000 in the trunk of a car."  
(S. M. 806)

In light of the diminishing demarcation between admissions and confessions, since both are out-of-court statements allegedly made by the accused, it is submitted that for federal constitutional purposes any labelling of one as against the other is inconsequential. McCormick On Evidence, Second Edition, Sec. 144. As such the appellant's statement must be viewed within the context of a confession given by one who was intoxicated. No federal court would allow a witness to testify before it, if his condition could be described as "bombed" and unqualifiedly as "he was drunk". Yet the trial judge permitted out-of-court statements made by one so described to be submitted to the jury, for it to determine whether they were voluntary. It thus abridged his right to a trial on evidence, uncontaminated by the mouthings of a drunk, even though it be himself.

A statement is admissible if it be a manifestation of the free will of the speaker. But a statement is not such an expression if it "does not reflect his own free will or intellect, if his statement's attributable in critical measure to the fact that his self protective mechanism is negated or overridden by external force or fraud, a condition of insanity, the compulsion of drugs." Pea v. United States, 397 F. 2d 627, 634 (D. C. Cir. 1967).

It is submitted that inebriation such as hereinabove set forth should be added to the foregoing classifications.

POINT TWO

THE COURT SHOULD EXAMINE THOSE SEALED REPORTS  
AND GRAND JURY TESTIMONY WHICH WERE NOT MADE  
AVAILABLE TO COUNSEL FOR THE APPELLANT.

This case centered upon the credibility of the witnesses appearing for the Government. As such continual demands were made for all statements producible under Title 18, Section 3500 of the United States Code.

The trial court held that under subdivision (c) of the aforesaid section that the testimony of Faye Somas before a Suffolk County Grand Jury, various reports of agents of the Federal Bureau of Investigation, as well as of the Drug Enforcement Administration, were to be sealed, and in the event of conviction, to be examined by this Court.

In light of the foregoing it is prayed that this Court examine the aforesaid documents and determine the validity of the said rulings.

COUNT THREE

THE APPELLANT FRANK BREEN INCORPORATES BY  
REFERENCE THE ISSUES RAISED BY THE CO-APPELLANT  
JOHN INDIVIGLIO.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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STATE OF NEW YORK )

: SS:

COUNTY OF RICHMOND )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of Dec, 1974 deponent served the within Brief upon M. L. Attorney

attorney(s) for Appellee

in this action, at 225 Cadman Plaza East Brooklyn, NY

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this

20 day of Dec. 1974

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976